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No. 83-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SATELLITE TELEVISION & ASSOCIATED RESOURCES, INC.

Petitioner,

v.

CONTINENTAL CABLEVISION OF VIRGINIA, INC., *et al.*

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

Whether it is an illegal monopolization or restraint of trade under the antitrust laws for the holder of a nonexclusive cable TV franchise systematically to impose on resisting third parties—owners of apartment buildings—as a condition to installation of its system, a privilege of exclusivity that results in foreclosing access by competing pay TV systems to nearly 90% of potential apartment dwelling subscribers in the franchise area?

LIST OF PARTIES

Petitioner: Satellite Television & Associated Resources, Inc.

Respondents: Continental Cablevision of Virginia, Inc., Continental Cablevision of Richmond, Inc., Continental Cablevision, Inc.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioner Satellite Television & Associated Resources, Inc. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on August 11, 1983, petition for rehearing *en banc* denied September 27, 1983.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The memorandum opinion of the District Court, which was not officially reported, appears in CCH *Trade Cases* 1982-2 ¶ 64,733 and in the appendix hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on August 11, 1983. A timely petition for rehearing *en banc* was denied on September 27, 1983, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code Title 15 §§ 1 and 2

Sherman Antitrust Act

§ 1 Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . .

§ 2 Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Clayton Act 15 U.S.C. § 12-27
(Sections 3 and 4 of the Clayton Act)

§ 3 That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the ju-

risdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

§ 4 That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee.

STATEMENT OF THE CASE

The Plaintiff, Satellite Television & Associated Resources, Inc. ("STAR") is a seller of pay television who transmits a single channel of movies by microwave to antennas located on the roofs of single family dwellings and apartment buildings. Defendents (collectively "Continental") are purveyors of pay television, including the enhancement of broadcast television signals, movies and other services by coaxial cable. The defendants, over apartment owners' objections[1], required them—by threatening otherwise not to install its system and thereby place individual owners at a competitive disadvantage

[1] Defendants negotiated with apartment owners on a group basis, through the Richmond Apartment Council ("RAC"), which represents virtually all apartment owners in the Richmond/Henrico metropolitan area, on the terms of a standard form contact. These

with other apartment owners[2]—to sign exclusive agreements that barred other pay television sellers from access to their buildings. As a result Plaintiff, despite orders in hand from individual apartment dwellers in virtually all of the affected buildings,[3] was barred from access to 87.5% of individual apartment dwelling units within the Defendants' non-exclusive franchise area in the county of Henrico, Virginia.[4] Apartment dwellers, so far as statistics are available, accounted for 87.5% of Defendants' total subscribers; and Defendants had 97.4% of total pay television subscribers within the Henrico franchise area.[5]

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negotiations resulted in agreement on all terms of the standard contract except exclusivity, as to which the Apartment council went on record as follows:

> "Continental had been extremely cooperative about our recommendations but were adament that the exclusive rights clause remain in the contract. Discussion followed on the problems this may present, especially in view of the microwave system that will soon be available in Richmond and any future system that may be available and will be prohibited. . . . After considerable discussion it was moved, seconded, and unanimously approved that members be notified that RAC endorses the Continental Cablevision standard agreement for RAC members, with the exception of the exclusive rights clause." (D 500).

[2] See quotation below in the first paragraph of Reason 1 for granting the writ.

[3] The undisputed affidavit of plaintiff's local sales representative, Dorothy Sanger, states:

> "At one time or another, RSTV [plaintiff] had received at least one request from virtually every apartment complex in Richmond/Henrico. Typically, there were 10-25 requests per complex, only about 25% of the complexes had only one or two requests." (Para. 4) Joint Record p. 91.

[4] Joint Record, pp. 73 and 74, para. 102, p. 211.

[5] Joint Record p. 76. Defendant had two such franchises, one for the City of Richmond and the other for adjoining Henrico County. Henrico is a relatively affluent suburb, demographically superior to Richmond for pay T.V. (Sanger affadavit, Joint Record, p. 90, par. 7.

This case is the first to present the question of foreclosing access to competing television systems in apartment buildings by threatening resisting owners with a competitive disadvantage, which is an issue of fundamental importance to this important emerging sector of the telecommunications industry.[6]

Defendants' rationale for requiring exclusivity was not based on any ground of physical or economic impossibility of both the cable and microwave or other forms of pay TV serving the same building, and no such claim has been made. Continental's rationale was rather based on a miscalculation of the total number of apartment complexes within its franchise area. Continental's local manager, Goodall, testified that apartments being more expensive for a cable system to install, the revised count increased his total system investment from $7 million to $10 million (Goodall Dep. 118). Although his franchise agreement permitted negotiation of special rates for apartment units, he elected rather to insist on exclusivity as a means of recouping his increased investment, which he expected would be fully returned in 5 years (Goodall Dep. p.72).

Defendants' franchise required it to serve 100% of the franchise area and Henrico officials insisted that Defendants' refusal to install without exclusivity was a violation

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[6] This Court has already recognized the importance of protecting competitive interests in cable television. *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982). A recent trade publication shows cable penetration of households in top 20 designated markets ranging from a low of 13.9% in Minneapolis-St. Paul to as high as 57.3% in Pittsburgh. National Cable Television Association, *Cable Television Developments*, November, 1983.

of that commitment.[7] Continental, which had begun operating in the spring of 1978, and had obtained its exclusive contracts well in advance of system construction at least as early as April, 1979, eventually agreed to discontinue enforcement of the exclusivity provision in 1980. This suspension was not voluntary, but in Continental's view coerced, because Plaintiff had objected in

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[7] "Grantee shall complete construction of the system in the Initial Franchise Area and offer and deliver cable television service in full accordance with this ordinance and the franchise granted hereunder to subscribers in not less than twenty-five percent (25%) of the occupied dwelling units within the Initial Franchise Area within one (1) year after receiving all necessary permits, authorizations and licenses and to one hundred percent (100%) within four (4) years." Henrico Ordinance, June 22, 1977, Article V Sec 8C.

* * *

"The Grantee shall not, with regard to fees, discriminate or grant any preference or advantage to any person; provided, however, that the fees may be negotiated between Grantee and the owner or owners, or committee acting on their behalf for regular subscriber service provided to ten or more dwelling units within an apartment building, condominium, garden apartment or townhouse complex under common ownership, or to ten or more room units within hotels and motels or to commercial establishments engaged in the sale of television receivers." *Id.*, Article IV Sec. 1D.

The opinion below places distorted emphasis on the fact stipulation that Continental would not have installed its system without exclusivity. That stipulation relates only the unilateral bargaining position Continental took, its subjective bargaining stance which is not an ultimate fact as to whether Continental's system would have been available. STAR has taken the position throughout that Continental had no choice, being bound under the above quoted language of the franchise. Henrico County officials also were of this view:

> "It was obviously not the intent of the Richmond City Council or the Henrico County Board of Supervisors to grant your company the exclusive right of access to area apartments thereby depriving apartment dwellers of their freedom of choice." (D 47).

a collateral FCC proceeding to the grant of a permit needed by Continental to obtain additional programming on the basis of the anticompetitive effect of the exclusive contracts. Convinced that the FCC would not act while this complaint remained pending, Continental, still insisting on the legality of its contracts, agreed to discontinue enforcement.[8]

Plaintiff's claim is for damages incurred during the period of exclusivity which was the crucial two years during which both Plaintiff and Defendant made their initial solicitation of subscribers. (Plaintiff and Defendant were not making competing solicitations of apartment owners, as the opinion below mistakenly implies. Plaintiff only approached apartment owners for permission to install after it had orders in hand, but was confronted with Defendants' exclusive contracts obtained *before* it began soliciting subscribers.) During that period Plaintiff had the selling advantage of being able to deliver its system to most apartments before Defendants' cable was laid. By the time Defendant suspended enforcement its system was in place, and, Plaintiff contends, thereby permanently deprived Plaintiff of many subscribers that it otherwise could have obtained. The question of the legality of Defendants' practice remains alive, not only for purposes of Plaintiff's damage claim, but by reason of Continental's continued insistence on its legality, and the absence of any definitive ruling on the issue other than in this case.

This case was submitted to the District Court on cross motions for summary judgment on the basis of stipulated facts, uncontested documentary evidence and affidavits, and deposition testimony. Both the District Court and the Court of Appeals held the Defendants' exclusive con-

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[8] Joint Record, pp. 72, 73; paras. 99-101.

tracts valid under the Rule of Reason as applied by this court in *Continental T.V. Inc.* v. *G.T.E. Sylvania, Inc.*, 433 U.S. 36 (1977) on the basis of Defendants' unilateral statement that they would not install their system without exclusivity, so that exclusivity served the beneficial purpose of making Defendants' system available to apartment owners. Both courts also held that pay television was not a relevant product market because it competes with a variety of other entertainment media, including spectator events, theaters, concerts, sports activities, radio and phonograph; that Defendants' franchise area in Henrico County was not a relevant geographic market; and that the extent of market foreclosure should be measured in terms of total population figures, giving no weight to demographic differences or the relative importance of apartment dwellers among total subscribers.

REASONS FOR GRANTING THE WRIT

1. ***The Court Of Appeals Erred In Failing To Apply The Section 2 Principles That Natural Monopoly Power May Not Be Leveraged To Extend The Scope Of Monopoly, Or Be Used Arbitrarily To Foreclose Any Substantial Business Opportunity.***

A cable television system, though not a necessity, verges on being a natural monopoly because costs do not ordinarily justify constructing more than one such system in the same geographic area. The Plaintiff's microwave system, which offered one channel of movies and no signal enhancement or other services, could not exert the kind of bargaining leverage over apartment owners that a cable system could and did. Nor did Plaintiff seek exclusivity as a condition to providing its service. Defendant aggressively marketed its system by threatening to put resisting owners at a disadvantage. The record con-

tains numerous letters to apartment owners such as the following:

> "As a businessman, I'm sure you realize it's not just the competitive advantages over other communities in Richmond and Chesterfield which make the decision to offer cable to your residents a sound one. Perhaps even more important to your company is the fact that if Westminister Commons *does not* sign up for cable, then it will most assuredly be suffering from a *competitive disadvantage*, when prospective residents compare it to other Henrico communities . . ."
>
> Facing the question squarely, I would state that your decision is to either accept the competitive advantages of cable as things stand today, or suffer the disadvantages of not having cable for the next several years in hopes that some company may (at some point in the distant future) develop and market an alternative single-channel system . . ." (P. 211; emphasis in original).

This, Plaintiff submits, is exactly the kind of violation this Court found in *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973): the use of "a strategic dominance to foreclose potential entrants . . . from outside sources of supply" (p. 377).

The dismissal by both of the courts below of the Plaintiff's Section 2 claim on the basis of a restrictive definition of the relevant market overlooks the fact that the principle declared in *Otter Tail* and earlier precedents,[9] does not depend on the definition of a relevant market.

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[9] *United States* v. *Griffith*, 334 U.S. 100 (1948); *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 181 (1944).

The Court of Appeals decision is also directly in conflict with the rule applied by this Court and other circuits—as well as earlier in the Fourth Circuit—declaring that the foreclosure of any substantial business opportunity is a violaton of Section 2, without regard to the definition of a relevant market.[10]

These contentions were made in both courts below but addressed by neither of them.

2. *The Court Below Erred In Failing To Hold The Defendants' Exclusive Contracts An Illegal Restraint Of Trade Under Section 1 Of The Sherman Act And Section 3 Of The Clayton Act*

The Fourth Circuit's opinion on the exclusive dealing issue unraveled much heretofore well settled law, mainly through an inadmissably broad reading of this Court's decision in *Continental T.V. Inc.* v. *G.T.E. Sylvania, Inc.*, 433 U.S. 36 (1977). That case held that vertical exclusive dealing agreements between a manufacturer of brand name merchandise that is in competition with other brand name merchandise, and its distributors, should be tested under the Rule of Reason, citing the facts that the

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[10] *Lorain Journal Co.* v. *United States*, 342 U.S. 143 (1951); *Gamco, Inc.* v. *Providence Fruit and Produce Bldg.*, 184 F.2d 484 (1st Cir. 1952), *cert. denied*, 344 U.S. 817 (1942); *American Federation of Tobacco Growers* v. *Neal*, 183 F.2d 869 (4th Cir. 1950); *Goldman Theatres, Inc.* v. *Loew's, Inc.*, 150 F.2d 738, 744 (3d Cir. 1945). *Goldman Theatres*, holding monopoly of first run movies a violation of Section 2 declared:

> "We know of no authority which sanctions what would otherwise be an illegal monopoly simply because it operates in a single city or a particular part of a city and affects only a part of an industry involved. There is no such limitation on the effect of the antitrust laws."

The Fourth Circuit's opinion in this case constitutes precisely the kind of authority the Third Circuit found not to exist.

public is protected by the interbrand competition and that the exclusive arrangement may improve the competitive performance of the distributors. In that type of exclusive dealing arrangement both parties are on the same team; in the present case they are not. Apartment owners, though in a vertical relationship to a cable company, do not have a mutual interest in selling the cable company's programming. The apartment owner is involved only because his consent is necessary before cable or any other form of pay television requiring physical attachments to the building can be installed. *Loretta* v. *Teleprompter Manhatten CATV Corp. et al.* ___ U.S. ___ (June 30, 1982), 73 L.Ed.2d 868, 102 S.Ct. 3164. There is no comparable protection for apartment dwellers who are the actual subscribers to that of consumers who in distribution cases of the *GTE* type benefit from interbrand competition. The apartment owner is rather a bottleneck, and when he grants an exclusive contract individual subscribers are denied the benefit of any competitive alternatives for pay television. This is not a vertical case of the *GTE* type and its applicability to the present fact situation is a serious misreading of that opinion. The importance of clarifying the law regarding exclusive dealing agreements has already been recognized by this Court's consideration at this term of *Hyde* v. *Jefferson Parish Hospital District No. 2*, 686 F.2d 286 (5th Cir. 1982), cert. granted ___ U.S. ___, 103 S.Ct. 1271 (1982).

What is even more remarkable about the opinion below is the undisciplined scope it gives to the Rule of Reason. Both the District Court and the Court of Appeals based their conclusion that the contracts were reasonable on Continental's unilateral assertion that it would not wire the apartments without exclusivity, from which they concluded that the exclusivity provision therefore benefitted subscribers by making Continental's system available to

them. This amounts to a novel form of antitrust defense that if accepted would make a dead letter of the Sherman Act. If it is enough for a would be competitor to declare that he will not participate unless he is given a monopoly, there is hardly any offense of the Sherman Act that could not be immunized on that basis.

Moreover, the rationale adopted below ignored the existence of an obligation by Continental under its franchise to service 100% of its franchise area;[11] and there is no evidence that Continental's position had any legitimate economic justification. Continental did not assert that cable and microwave systems could not viably co-exist in a single apartment building. Their sole rationale was that their total systemwide investment requirement had been increased from $7 million to $10 million by reason of the fact that they found *more* apartments than they expected. Implicit in this assertion is an admission that had they not miscounted the apartments their expectation was to wire them, and without requiring exclusivity—a thought that did not even occur to them until after they discovered their miscounting. The Defendants' local manager Goodall admitted that he settled on exclusivity after considering other options because excluding competitors would be the most profitable:

> "Well, I knew there were a number of people after the pie that I was after and that was the consumers disposal [sic] entertainment income, if there is such a pocket or a bucket; and that if I could keep some of those competitors, make them not available to them, I would have a better chance." (Goodall Dep. pp. 206-207).

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[11] Note 7, *supra*.

Goodall was concerned about the added risks of this increased capital investment, and considered the option of charging apartment dwellers a commensurately higher rate to cover the higher costs of apartment installation. He rejected this alternative because he found the exclusion of competition more profitable. He testified that raising the prices "would have made it harder to sell," that he wanted to serve the apartments "because I saw how many units there were in the area and what a large percentage of the residents it represented." (Goodall Dep. p. 202). By Continental's admission, with exclusivity they expected to recoup their entire investment within 5 years, even though their renewable franchise was for 15 years and they depreciated the system over 12. (Goodall Dep. 72).

In *Northern Pacific Railway Co.* v. *United States*, 356 U.S. 1, at 5-6 (1958) this Court held tying agreements illegal per se, definiing such agreements as follows:

> "An agreement by a party to sell one product but only on the condition that the buyers also purchase a different (or tied) product, *or at least agree that he will not purchase that product from any other supplier.*" (footnote omitted, emphasis added).

Whether viewed in terms of the physical delivery system, the respective programming, or both, these contracts were illegal tying agreements. Defendant agreed to install its cable system on condition that no other (different) system be installed. Or, in terms of Plaintiff's and Defendants' respective programming, this Court held in *United States* v. *Loew's, Inc.*, 371 U.S. 38 (1962) that for purposes of the Sherman Act Section 1 per se rule against tying agreements, copyrighted films are inherently unique and therefore separate products. The contracts here, like those condemned in *International Salt Co.* v. *United States*, 332 U.S. 392, 396 (1947) have no purpose

other than to foreclose competition. The applicability of this rule to cable television systems is a question that should be resolved promptly.

There are also two questions posed by Section 3 of the Clayton Act. The first concerns the applicability of the act itself, which would surely be violated if it applies. It is undisputed that television programming is not a commodity, which is a prerequisite to the applicability of that act. But the exclusive contracts are with apartment owners, not subscribers. Apartment owners are not contracting for TV programming as subscribers do, but for the physical installation of a cable TV system in their buildings. The agreement with an apartment owner to install the system in his building should be sufficient to bring it within the terms of Section 3 which includes leases of machinery. The opinion below mis-stated Plaintiff's contention and ignored this point.

A second question is whether it makes any difference whether Clayton 3 applies directly because its substantive rule articulates one specific form of illegal restraint of trade barred by Section 1 of the Sherman Act.[12]

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[12] This case affords an opportunity to make explicit what has been implicit in several circuit court rulings and one decision of this Court but never spelled out by them or this Court: The interrelation of Section 3 of the Clayton Act with the Sherman 1 rule against tying agreements. The Sherman Act rule has traditionally been stated to require two distinct products; Clayton 3 does not, requiring only that there be separate *transactions*, which can involve the same product. At least one Supreme Court case and two Circuit court cases have upheld complaints under § 1 of the Sherman Act against exclusive dealing contracts without requiring that there be two distinct products as required by the pure tying cases. *International Boxing Club of New York, Inc.* v. *United States*, 358 U.S. 242 (1959); *Perrington Wholesale, Inc.* v. *Burger King Corp.*, F.2d 1369, 1374-5 (9th Cir. 1972); *Bales* v. *Kansas City Star Company*, 336 F.2d 439 (8th Cir. 1964).

3. *The Court Below Erred In Relying On Assumptions Of Economic Theory To The Exclusion Of Principles Of Law*

The Fourth Circuit's opinion sought to rationalize Continental's behavior in terms of economic theory.[13] This Court in 1972 declined to enter the "wilds of economic theory"[14] which has no basis in law, and yet is currently being increasingly asserted as authoritative. The theory, which is critical of both the judicial and legislative rules against tying and other forms of vertical market foreclosure, is unsound and should be repudiated by this Court.[15]

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[13] Footnote 9 on page 11 of the Circuit Court's opinion (Appendix p. 9a) is an extraordinary resort to economic theory as an alternative explanation for what the record shows was the leveraging of economic power to force apartment owners into granting exclusivity against their will.

[14] *United States* v. *Topco Assoc.*, 405 U.S. 596, 609, n.10 (1972).

[15] Bork, Robert, *The Antitrust Paradox* (1978), Chapter 15 is representative of this kind of thinking—which is highly controversial. See, e.g., Bork, Bowman, Blacke & Jones, "The Goals of Antitrust: A Dialogue on Policy," 65 *Columbia L. Rev.* 363 (1965). The unreality of the theory is authoritatively described by an economist with extensive business experience, Oswald Knauth, in *Managerial Enterprise (1948)* and *Business Practices, Trade Position, and Competition* (1956).

CONCLUSION

The Fourth Circuit's opinion declares a sweeping new permissive rule for trade restraints in the field of pay television. In doing so it ignores the long established principle of this Court that restraints having no other purpose than to foreclose competition are illegal, and reads into this Court's decision in *GTE Sylvania* a much broader tolerance for exclusivity than the opinion warrants. This case is thus of fundamental legal as well as practical importance.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 82-1354

SATELLITE TELEVISION & ASSOCIATED RESOURCES, INC.,

Appellant

v.

CONTINENTAL CABLEVISION OF VIRGINIA, INC., *et al.*,

Appellee

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. D. Dortch Warriner, District Judge

---

Argued November 11, 1982 Decided August 11, 1983

Before RUSSELL and HALL, Circuit Judges, and GORDON*, Senior District Judge.

Dudley H. Chapman (Keith I. Clearwaters, Chapman & Clearwaters; Patrick M. McSweeney, Jack W. Burtch, Jr., McSweeney, Stutts & Burtch on brief) for Appellant; Martin Michaelson (Robert J. Kenney, Jr., John E. Hoover, Hogan & Hartson; Everette G. Allen, Jr., Charles F. Witthoefft, Hirschler, Fleischer, Weinberg, Cox & Allen on brief) for Appellees.

GORDON, Senior District Judge

Plaintiff, Satellite Television & Associated Resources, Inc. (STAR), and defendants, Continental Cablevision, Inc., Con-

tinental Cablevision of Virginia, and Continental Cablevision of Richmond (Continental)[1] operate pay television services in the City of Richmond and the surrounding area.[2]

On September 4, 1980, STAR filed suit against Continental alleging violations of the Sherman Act, 15 U.S.C. § 1, *et seq.*, and the Virginia Antitrust Act, *Va. Code* §§ 59.1-9.5 & 59.1-9.6 (1950). Later STAR added an allegation of violations of the Clayton Act, 15 U.S.C. § 12 *et seq.*

In its final amended complaint STAR alleged that Continental had entered into an illegal contract, combination and conspiracy with the apartment owners in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1 and Section 3 of the Clayton Act, 15 U.S.C. § 14. STAR alleged also that Continental had monopolized and attempted to monopolize the pay television market in Metropolitan Richmond in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2. Finally STAR alleged that the same actions by Continental were violations of the Virginia Antitrust Act.

The case was decided by the District Court in March 1982 based on affidavits, exhibits and jointly stipulated facts submitted by the parties. The District Court dismissed the Section 3 Clayton Act claim on the court's finding that Continental offered television programming, a service, and therefore was outside the purview of the Act.[3]

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[1] STAR operates in the Richmond area through several subsidiaries, the structure of which is irrelevant to the lawsuit. Similarly the three "Continentals" are interrelated, and the relationships have no relevance to the lawsuit as decided. Therefore "Continental" will be used in the singular throughout to refer to all three.

[2] "Metropolitan Richmond" includes Charles City County, Chesterfield County, Goochland County, Hanover County, Henrico County, New Kent County, Powhatan County and Richmond City.

[3] The Act covers the lease or sale of "goods, wares, merchandise, machinery, supplies, or other commodities . . ." 15 U.S.C. § 14.

The court granted Continental's motion for summary judgment on all remaining claims. The court rejected STAR's contention that although Metropolitan Richmond is the market for antitrust purposes, Henrico County and Richmond proper are "submarkets" monopolized by Continental. Accepting Continental's broader definition of the relevant market, the court rejected the Section 1 Sherman Act claim because the effects of Continental's exclusivity provision were found to be procompetitive in the short run and not substantially anticompetitive in the long run. Moreover, the court found that Continental lacked both the requisite intent and market power to have violated Section 2 of the Sherman Act. The Virginia Antitrust Act tracks the federal statute, and therefore the state claims failed as well.

We find the result reached by the District Court to be correct, and with some elaborations affirm.

Continental is the more successful of the two operations; both having started transmitting at about the same time, March of 1979. Continental had at least 19,500 subscribers by February, 1981, while STAR had about 1,400.

Continental gained this advantage, claims STAR, largely because of an exclusivity clause in its contracts with the owners of the Henrico County and Richmond City apartment complexes.

In 1978, concerned about the very high cost of wiring multiple dwelling units (MDU's) for cable and the risk of not receiving an adequate return on capital expended to wire MDU's, Continental gave apartment owners wanting cable hookup two options: either pay the expense of wiring their buildings for cable or give Continental exclusive pay television rights to their MDU's. Apartment owners were forced to this choice if they wanted to offer their tenants cable; and thereby stay competitive with other apartment owners offering cable. At all times the owners were free to reject Continental's offer and contract with STAR for its direct broadcast television service. Apparently the apartment owners, the majority of whom own-

ed complexes located in Henrico, chose to give Continental exclusive contracts, which STAR argues severely hurt its ability to compete. Continental began using the exclusivity provisions in July 1978 and agreed to abandon them in June 1980, when STAR was successfully delaying FCC proceedings necessary to Continental's profitability by objecting to the provision to the FCC. The exclusivity provisions are no longer enforced nor are they put in new contracts.

I.

The first issue in this case is its posture on review. The case may be reviewed as either a summary judgment or as a full trial—tried by the Court on stipulated facts, exhibits and affidavits. We will review the case as one tried by the District Court; we will upset a finding of fact made by the court only if the finding is judged by us to be clearly erroneous.[4]

We treat the case as one tried by the District Court because neither side requested a jury trial; both sides negotiated extensively over the joint stipulations—adding a twelve volume appendix—and both sides agree that the case was submitted on this basis with no material issue of fact in dispute. *Vetter* v. *Frosch*, 599 F.2d 630, 632-33 (5th Cir. 1979). Treating the case as one coming to us on summary judgment would accomplish nothing more than to risk the needless expenditure of the resources of the litigants and the District Court—a result all parties are to be commended for having avoided thus far.

II.

The second issue to be decided by this Court is whether or not the District Court erred in ruling that the validity of

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[4] We treat the Clayton Act and damages claims which were handled on a motion to dismiss as being the equivalent of summary judgment, Fed.R.Civ.R. 12(c), and, in this case, trial because the factors listed above apply equally to that claim.

Continental's exclusivity provision is properly considered under the Rule of Reason or the *Per Se* rule of illegality.

We think that the District Court was correct in its decision to apply the Rule of Reason. *Per se* rules of liability should be applied to conduct only when the "pernicious effect on competition and lack of redeeming virtue" are manifest. *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 49-51 (1977). Exclusive dealing contracts which might function to increase interbrand competition have never been held to be a *per se* violation of the antitrust laws by the Supreme Court. *Brayman* v. *Bassett Furniture Industries, Inc.*, 552 F.2d 90, 101 (3rd Cir.) *cert. denied*, 434 U.S. 823 (1977). Especially when the parties have stipulated that Continental would not have wired MDU's, thereby leaving STAR as the only pay TV service, without such a guaranty or payment upfront, the court below was justified in holding that the competitive effects of the provision should be judged by the Rule of Reason. Plaintiff bases its *per se* argument on the equivalent of the exclusivity provision to a tie-in; here the alleged tie is between the transmission equipment installed in the buildings and the programming. Like the District Court, we conclude that the programming and the transmission equipment are one product. It is clear to this Court that the transmission equipment is incidental to the provision of the service, which is the dominant factor in the transaction. *Tri-State Broadcasting Co.* v. *United Press International, Inc.*, 369 F.2d 268 (5th Cir. 1966).

III.

There are several types of exclusivity provisions which have come before the courts—in the main, exclusive dealership or territory provisions have been sanctioned because the effected increase in interbrand competition has outweighed the decrease in intrabrand competition; *see, Continental T.V. Inc.*, 433 U.S. 36. Exclusive requirement contracts have been sanctioned when the Exclusive requirement contracts have been sanctioned when the effect on immediate and future competition in the relevant market was not substantial and the con-

tract provided a mutual benefit to buyer and seller; *see, Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U.S. 321 (1961). In contrast, tying agreements have suffered at the hands of the courts for "[serving] hardly any purpose beyond the suppression of competition", *Standard Oil Co. of California* v. *United States*, 337 U.S. 293, 305 (1949) [Discussion of *International Salt Co.* v. *United States*, 332 U.S. 392 (1947)].

These appellations, like most others in the law, are convenient shorthands, but in each case the effects of the contract clause or practice at issue differ—and must be scrutinized. This case is no different.

The relative merits and demerits of the provision in regard to Continental, STAR, and apartment owners and dwellers can be distilled into one question, which the District Court broke down into two parts: Does the exclusivity provision substantially lessen competition, Now? In the future? Only this issue is necessary and sufficient to determine validity of exclusivity provision. *National Society of Professional Engineers* v. *United States*, 436 U.S. 679, 692-96 (1978).

In order to answer this two-pronged question, we must first define the relevant market because the concept of competition has no meaning outside its own arena; however broadly that arena is defined. *See, G. Hale & R. Hale, Market Power: Size and Shape under the Sherman Act* § 3.7 at 116 (1958), cited in *Comment, Relevant Geographic Market Delineation: The Interchangeability of Standards in Cases Arising under Section 2 on the Sherman Act and Section 7 of the Clayton Act*, 1979 Duke L.J. 1152, 1157, n.29.

The plaintiff in an antitrust case bears the burden of proof on the issue of the relevant product and geogrpahic markets. *Gough* v. *Roosmoor Corp.*, 585 F.2d 380, 389 (9th Cir. 1978).

After considering the contentions of the parties, the District Court held the relevant product market to be "those products or service which are 'reasonably interchangeable by consumers for the same purposes' ", *United States* v. *E.I. Dupont*

de Nemours & Co., 351 U.S. 377, 395 (1956). The Court found that "cinema, broadcast television, video disks and cassettes, and other types of leisure and entertainment-related businesses for customers who live in single-family dwellings and apartment houses . . ." all met the requirements of the *Dupont* test. STAR does not dispute that this is a market; it argues only that pay television services to apartment dwellers is the relevant "submarket".[5]

STAR supports it case with the argument that although it stipulated that potential customers perceive STAR's and Continental's services to be "reasonably interchangeable" with the offerings of movie theaters, and both are in competition with the wide variety of entertainment services enumerated above,[6] "there is no stipulation, and no findings, as to the degree of interchangeability or cross-elasticity of demand between any of the other alternatives and pay TV". Therefore, STAR argues, we may find pay television to be a "submarket". STAR fails to realize that it is exactly this failure to provide as evidence anything more than generalizations about the interchangeability and competition among the types of entertainment listed that is fatal to its submarket theory.

In *Dupont*, *supra*, the Supreme Court stated: "[i]n considering what is the relevant market for determining the control of price and competition, no more definite rule can be declared than that commodities reasonably interchangeable by consumers for the same purpose make up that [relevant market]. . . ." 351 U.S. at 394-95. One may attempt to clarify this definition with more precise economic terms by stating that

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[5] The use of the term "submarket" is to be avoided; it adds only confusion to an already imprecise and complex endeavor. For antitrust purposes a product group or geographic area either meets the listed criteria, in which case it is a relevant market; or it does not, in which case it is irrelevant for purposes of analysis. No fiddling with nomenclature will change the analysis or result.

[6] J.S. ¶¶ 36-38.

the outer boundary of the relevant product market is reached, if one were to raise the price of the product or limit its volume of production, while demand held constant, and supply from other sources beyond the boundary could not be expected to enter promptly enough and in large enough quantities to restore the old price or volume.[7] "A 'relevant market', then, is the narrowest market which is wide enough so that products from adjacent areas or from other producers in the same area cannot compete on substantial parity with those included in the market."[8]

Plaintiff must show that because consumers do not perceive entertainment media to be reasonably interchangeable with pay television or because of some market limitation on the ability of the producers of reasonably interchangeable products to increase volume over the relevant demand range, that pay television is the relevant market. Having stipulated that consumers perceive movies shown in theaters to be "reasonably interchangeable" with the services offered by Continental and STAR, and having stipulated that the other media listed are in competition with Continental and STAR, the burden is on STAR to provide probative evidence to show that despite these facts, economic factors or consumers perceptions limit the competitor's ability to compete—this STAR has not done. It argues only that proof of the "submarket" is found in the fact that Continental's contract excludes only other pay television companies. Whatever else this contractual provision might be, it is not sufficient proof that pay television is the relevant market—particularly when contrasted with the stipulations.

Similarly, STAR argues that apartments are a distinct "submarket" because of economic and competitive conditions distinct from those of single family residences, the most impor-

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[7] L. Sullivan, *Handbook of the Law of Antitrust* § 12 at 41 (1977), quoted in *Comment, Relevant Geographic Market Delineation, supra* at 1158.

[8] *Id.*

tant of which is the intervention of the apartment owner or manager as limitor on access to pay TV by the consumer. Even were the Court to assume that economic and competitive conditions differ between single family dwellings (SFD's) and MDU's, STAR has failed to show that these differences result in an inability of competitors of Continental to provide substitute services at sufficient volume and price to impose limits on Continental's ability inordinately to influence price and supply.[9] To the contrary, the added expense and other problems of apartment installation of cable are a limit on Continental's ability to compete in the marketplace.

STAR's failure to meet its burden of proof is equally evident regarding the geographic market. STAR asserts that Henrico County is the relevant geographic market because: Continental began its construction there; Henrico was the most atrractive area demographically; it was the "primary area of significant head to head competition" between STAR and Continental; and it is the area in which Continental's success was so remarkable as to create a relevant market.

The District Court, relying rightly on *Standard Oil Co.* v. *United States*, 337 U.S. 293 (1949), held that Metropolitan Richmond, being "the 'area of effective competition' for the relevant services or products which are in the product market", was the relevant geographic market.

STAR's argument is without merit. At no time relevant to this lawsuit were the litigants not competing in marketing or

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[9] Continental's ability to persuade apartment owners to accept the exclusivity provision is nothing more or less than "price" in the sense that keeping their future options open has a definite economic value to the apartment owners and the value can be translated into dollars and cents. In this case we can say that the economic value or "price" to the owners is less than the cost of paying for wiring their buildings and less than the revenue that they anticipate might be lost when prospective tenants choose an apartment with cable service over their apartment complex without cable.

operations both in Richmond and Henrico. STAR has presented no evidence limiting the market to Henrico; rather it agreed to joint stipulations which indicate that competitors of STAR and Continental in other media perceive Metropolitan Richmond to be one market.[10] STAR itself has subscribers in Henrico, Chesterfield and Hanover Counties as well as Richmond proper.

Using the rejected designation of product and geographic marketing, STAR's postulated measure of market foreclosure is the percentage of MDU's in Henrico under contract with Continental. Under this selective formula Continental might be seen to have a substantial market power,[11] but the District Court found market foreclosure to be only about 8 per cent. The Court's figure represents the number of MDU's under contract to Continental, about 19,500, over the total number of dwelling units, single and multiple, in Metropolitan Richmond. Both measures are misleading. Having found that the relevant market includes movies in theaters, broadcast television, sporting events, concerts, etc. in all of Metropolitan Richmond, the District Court did not have the information necessary to measure the degree of market foreclosure. The number of households can tell one nothing about the market power of STAR and Continental relative to their non-broadcast competitors. This complete absence of market measure alone should have entitled Continental to judgement in its favor.

Instead of ending the inquiry upon the failure of STAR to provide the necessary evidence, the District Court chose to examine the effect on competition using Continental's geographic market and a modified version of STAR's product market. We are satisfied that although the Court below need not have analyzed the question in this manner, having done so using measues of the product and geographic markets more

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[10] J.S. ¶¶ 40, 41, 42, 44, 45, 46.

[11] STAR uses the figure of 90 per cent; even granting STAR its market definitions, this number is open to serious question.

favorable to STAR than whose which it felt to be correct, its calculation—though worrisomely imprecise—is correct in its result. Continental's having chosen to service MDU's as well as SFD's increased competition in the short run by giving apartment owners a choice which they would otherwise have been denied. The fact that apartment owners or managers chose Continental's service over STAR's, when each was a new entrant into the market—even after the economic discounting of the benefits from Continental's service which should have followed from the exclusivity provision, proves only that apartment owners and managers perceived Continental's to be the superior service.

As regards the effect on future competition, no reliable estimate as to the future size of the pay television share of the entertainment market in Richmond is in the record. Because the industry is new to Richmond, the District Court would not have been justified in analyzing the effect on competition based on an assumption of a constant market over time. *Contrast, Tampa Electric*, 365 U.S. at 330-35. Nor was it justified in assuming that the market may include every household in Metropolitan Richmond. However, the provision at issue is no longer being used by Continental, which means that the market foreclosure on June 1980 is the maximum foreclosure. We cannot say that foreclosure of 8 per cent of the households in Metropolitan Richmond to STAR for a period no more than fourteen months between March 1979 and June 1980 will substantially lessen competition in either the pay television industry or the entertainment industry in Metropolitan Richmond in the future. *See, Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 627 (1952). Judgment is therefore properly given to Continental.

IV.

STAR's Sherman Act § 2 claim meets the same fate as its § 1 claim. Continental has not been shown to have anything resembling monopoly power in any relevant market. Having failed to show that Continental had either the probability of

achieving monopoly power, *American Tobacco* v. *United States*, 328 U.S. 781, 785 (1946), or the intent to achieve it,[12] *United States* v. *Griffith*, 334 U.S. 100, 105 (1948), STAR has failed to make out a claim for attempt to monopolize.[13]

V.

The District Court treated STAR's Clayton Act § 3 claim differently from the Sherman Act claims, granting Continental a dismissal. The District Court held that Continental offers a service, and therefore does not come within the purview of the Clayton Act, which covers only "goods, wares, merchandise, machinery, supplies or other commodities." *Advance Business Systems & Supply Co.* v. *SCM Corp.*, 415 F.2d 55, 64 (4th Cir. 1969).

The Court properly examined the transaction in order to determine its dominant nature, and found the dominant nature to be broadcasting—a service. *Tri-State Broadcasting Co.* v. *United Press International, Inc.*, 369 F.2d 268 (5th Cir. 1966). We agree. The transmission equipment is incidental to the programming—it is the programming that is by far the chief concern of all parties to the transaction.[14] *E.g.*, *Aviation Spe-*

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[12] STAR stipulated that Continental's decision was a good faith business judgment. J.S. ¶¶ 86-90. Such a stipulation is fatal to the finding of the requisite specific intent to monopolize. *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 627 (1952).

[13] The claims under Virginia Law for restraint of trade, *Va. Code* § 59.1-9.5 (1950) and monopolization *Va. Code* § 59.1-9.6 (1950) fail under the same reasoning which is properly applied under Virginia statute. *See*, *Va. Code* § 59.1-9.17 (1950).

[14] For the same reason, that what is offered is a service, not two products: cable television broadcasting equipment and cable television programming, STAR's assertion that the exclusivity provision constitutes an illegal tying agreement fails. *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U.S. 495 (1969).

cialties, Inc. v. *United Technologies Corp.*, 568 F.2d 1186 (5th Cir. 1978); *Kennedy Ticket Service* v. *Ticketron, Inc.*, 342 F.Supp. 922 (E.D.Pa. 1972).

The Judgment below is

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 82-1354

SATELLITE TELEVISION &
ASSOCIATED RESOURCES, INC.;

Appellant,

versus

CONTINENTAL CABLEVISION OF VIRGINIA, INC.;
CONTINENTAL CABLEVISION OF RICHMOND, INC.;
CONTINENTAL CABLEVISION, INC.;

Appellees.

ORDER

FILED
SEP 27 1983
U.S. Court of Appeals
Fourth Circuit

Upon consideration of the appellant's petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Gordon, U.S. District Judge, for a panel consisting of Judge Russell, Judge Hall, and Judge Gordon.

For the Court,

/s/ William K. Slate, II
WILLIAM K. SLATE, II
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

CIVIL ACTION No. 80-0681-R

SATELLITE TELEVISION &
ASSOCIATED RESOURCES, INC.,

v.

CONTINENTAL CABLEVISION OF
VIRGINIA, INC., *et al.*,

FILED
MAR 1 1982

MEMORANDUM

On 15 June 1981, plaintiff STAR filed an amended complaint in this antitrust action. Defendants move to dismiss portions of the amended complaint on the grounds (1) that plaintiff has failed to state a claim under Clayton Act § 3, 15 U.S.C. § 14 and (2) that the damage allegations of ¶ 28(d) are without legal basis. Defendants additionally move to dismiss on the ground that STAR is not the proper plaintiff in the case.

I.

Plaintiff alleges that "defendants have maintained a consistent policy to exclude plaintiff from the sale of pay television services to apartment units . . ." in violation of § 3 of the Clayton Act, 15 U.S.C. § 14. Defendants argue that § 14 is confined by its language to transactions involving "wares, merchandise, machinery, supplies or other commodities" and is inapplicable to the sale of services. Therefore, defendants move to dismiss the § 14 claim on the ground that plaintiff has failed to state a claim thereunder. Plaintiff argues that al-

though a service is involved, the transaction essentially constitutes the sale of a commodity within the ambit of § 14.

There is ample authority that § 14 does not encompass the sale of services. Hudson Valley Asbestos Corp. v. Tougher Heating & Plumbing Co., 510 F.2d 1140, 1145 (2d Cir. 1975); Advance Business Systems & Supply Co. v. SCM Corp. 415 F.2d 55, 64 (4th Cir. 1969); Columbia Broadcasting System, Inc. v. Amana Refrigeration Inc., 295 F.2d 375, 378 (7th Cir. 1961). The question presented, therefore, is whether what defendants provide is more in the natore of a service or a commodity.

Because the term "commodity" is not defined in the Act, the Courts have been required to interpret the term.[1] The word is to be given its usual and natural meaning, United States v. Investors Diversified Services, 102 F.Supp. 645, 648 (D. Minn. 1951), and is to be evaluated in the context in which it appears—"goods, wares, merchandise, machinery, supplies or other commodities." 15 U.S.C. § 14. Columbia Broadcasting System, Inc. v. Amana Refrigeration, Inc., 295 F.2d 375, 378 (7th Cir. 1961). Thus, a commodity is some type of tangible property that may be leased or sold.

Plaintiff argues that the commodity requirement is satisfied because defendants employ and install tangible machinery and equipment to transmit an electronic impulse which is itself a commodity. Plaintiff urges the Court to hold that there are two clear elements of tangibility in the operation of a cable television system: the cable network itself, including the physical attachment to buildings; and the signal which it transmits.

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[1] Both § 13 and § 14 refer to commodity in the same sense of the word. Baum v. Investors Diversified Services, Inc., 409 F.2d 872, 875 (7th Cir. 1969); City of Gainesville v. Florida Power and Light Co., 488 F.Supp. 1258, 1280 (S.D. Fla. 1980). Thus, a decision defining "commodity" under § 13 is also authority for determining what is a commodity under § 14.

In suport of the argument that the electronic impulse is a commodity, plaintiff relies on the holding of City of Gainesville v. Florida Power & Light Co., 488 F.Supp. 1258, 1283 (S.D. Fla. 1980), that electricity is a commodity within the terms of the Clayton Act. Defendants cite the holding of City of Newark v. Delmarva Power & Light Co., 457 F.Supp. 763, 774 (D. Del. 1979), that electricity is not a commodity. If the Delaware decision is correct, plaintiff's argument on this point clearly fails. But even if the Florida decision is correct, it does not support plaintiff's position because City of Gainesville is significantly distinguishable from the case at bar. In City of Gainesville, the Court was concerned with the sale of electricity, *per se*, as a source of power similar to coal or gas. Defendants have admitted are not in the business of selling electricity, or electronic impulses, and the cases holding or assuming that the sale of electricity is the sale of a commodity are not on point.

Plaintiff's second argument to support its position is that the tangible machinery and equipment employed in the cable system constitute commodities and that the tangibility of the delivery mechanism can bring a business based on a service within the ambit of § 14. To determine whether a business involves the sale of a service or of a commodity, courts employ the "dominant nature of the transaction" test:

> Virtually no transfer of an intangible in the nature of a service, right, or privilege can be accomplished without the incidental involvement of tangibles, and we conclude that in such circumstances the dominant nature of the transaction must control in determining whether it falls within the provisions of the Act.

Tri-State Braodcasting Co. v. United Press International, Inc., 369 F.2d 268, 270 (5th Cir. 1966).

In applying the dominant nature of the transaction analysis, courts look at the business as a whole. In General Shale Products Corp. v. Struck Construction Corp., 132 F.2d 426 (6th Cir. 1942), cert. denied, 318 U.S. 780 (1943), defendant contracted to construct housing facilities for the city, with defendant also providing the brick for the houses. The total price for the

project was flexible, depending on the price of the brick. The Court held that, although the sale of brick to the city was included in the contract, the city did not contract to purchase the bricks but rather for the construction of the houses. Thus, the transaction was essentially a service contract. Id. at 428.

In Hudson Valley Asbestos Corp. v. Tougher Heating & Plumbing Co., 510 F.2d 1140, 1145 (2d Cir. 1975), the Court held that insulation subcontractors provided primarily a service, and that the insulation materials used in providing the service are merely incidental to this principal function. Likewise, in Aviation Specialties, Inc. v. United Technologies Corp., 568 F.2d 1186 (5th Cir. 1978), the Court held that an agreement to repair engines for the value of labor plus the cost of parts was essentially the sale of a service, although the cost of parts sometimes exceeded the labor charge. Finally, in Kennedy Theater Ticket Service v. Ticketron, Inc., 342 F.Supp. 922 (E.D. Pa. 1972), the Court held that an admission ticket to an entertainment event is merely incidental to the sale of the intangible right to attend the event.[2]

The aim of the analysis in these cases is not simply to separate a business into its tangible and intangible components to determine its nature. Rather, the analysis presents a search for the essential element of the transaction as opposed to the incidental elements. In General Shale Products Corp., the defendant was in the business of building houses; in Hudson Valley, the defendant was in the business of insulating pipes; in Aviation Specialties, the defendant was in the business of repairing engines. Here, as in Kennedy Theater, the defendants are in the business of providing an entertainment service. The equipment and machinery necessary to provide cable television is merely incidential to providing the entertainment

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[2] Not mentioned were the seats, stage, arch, curtain, lights, props, and the like which were necessary to present the entertainment service but were essentially incidental to the service provided by Ticketron, Inc.

service. The subscriber contracts for this intangible service, not for the tangible equipment required to receive the service. If he could have the service without the equipment he would be just as happy—or happier. Accordingly, the claim under § 14 in the Amended Complaint is DISMISSED on the ground that the Clayton Act, § 3 does not reach a service and it is essentially a service which is the subject of the § 3 claim asserted in this suit.

II.

Defendants additionally move to dismiss certain damage claims asserted on the ground that plaintiff's expanded damage theory in the amended complaint is without legal basis. According to the amended complaint, plaintiff corporation, Satellite Television, Inc., (RST, Inc.) formed a limited partnership in Richmond, (RST, Ltd) to raise funds for a Richmond pay television system. Similar entities were formeed in several other cities. In September 1980, STAR alleges that it "cosolidated" all of its local limited partnerships into STAR, with STAR acquiring the assets of RST, Ltd. in exchange for the stock of STAR. The amended complaint substitutes STAR for the original plaintiff RST, Ltd. Plaintiff STAR alleges at paragraph 28(d) of the amended complaint:

> The foreclosure of a substantial portion of the apartment building market to plaintiff in Richmond had a material and foreseeable adverse effect on the building of its subscriber base, and thereby adversely affected plaintiff's ability to develop its business and to obtain financing for similar ventures in other cities, including Louisville, Kentucky; Birmingham, Alabama; Norfolk, Virginia; Pensacola, Florida; Tallahassee, Florida; Mobile, Alabama; Roanoke, Virginia; Boise, Idaho. Said foreclosure further led to suspension or abandonment of a similar ventures involving lost investment and the opportunity to earn profits in the following additional cities: Colorado Springs, Colorado; Albuquerque, New Mexico; Montgomery, Alabama.

Plaintiff seeks to recover for these losses.

In Hawaii v. Standard Oil Company of California, 405 U.S. 251, 263 n. 14 (1972), the Supreme Court stated: "The lower courts have been virtually unamimous in concluding that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." The Supreme Court cites South Carolina Council of Milk Producers, Inc. v. Newton, 360 F.2d 414 (4th Cir. 1966), as one of the examples in support of this statement.

In South Carolina Council, the Fourth Circuit provided guidelines for determining compensable injury under the antitrust acts:

> The pivot of decisions presently is whether the defendants' asserted conduct was the proximate cause of the plaintiffs' asserted injury. If the damage was merely incidental or consequential, or if the defendants' antitrust acts are so removed from the injury as to be only remotely causative, the plaintiffs have not been injured "by reason of anything forbidden in the antitrust laws" as contemplated by the Clayton Act.

South Carolina Council of Milk Producers, Inc. v. Newton, 360 F.2d at 419. This language was recently quoted by the Fourth Circuit in Ratliff v. Burney, 657 F.2d 640 (4th Cir. 1981), affirming a dismissal for failure to establish standing. In Ratliff, plaintiff alleged that a boycott by doctors of a county hospital resulted in loss of revenue to the county, a loss that plaintiff as taxpayer would ultimately bear. The Court held that not only was the plaintiff too far removed from the alleged violation, but also the alleged injury was too tenuous and remote. Ratliff v. Burney, 657 F.2d at 642.[3]

The injury The injury asserted in the amended complaint here is too tenuous and remote. No accumulation of facts in the

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[3] In South Carolina the district court was reversed for not permitting the jury to determine the causal connection at a trial. In Ratliff, on authority of South Carolina, the district court was upheld in its decision that the causal connection, in that case, should be determined as a matter of law on a motion to dismiss.

instant case could show an entitlement by plaintiff to recover damages from defendant on account of plaintiff's alleged inability to develop a market for its services in locations other than Richmond. Such losses are so removed geographically, corporately, financially, and competitively from the Richmond market that to give credence to the claim for damages by permitting a jury trial on the issue would make the antitrust laws look foolish. Further, if the motion to dismiss this claim for damages be denied despite the legal inability or recovery, both parties must engage in extensive discovery regarding the eleven cities beyond Richmond, at tremendous expense and to no avail. The discovery and the trial would be expanded eleven times over to no benefit.

We are here faced with a pure question of the reach of the antitrust law. The Court assumes, for the purpose of the motion, that defendants' exclusive contracts were anticompetitive and hindered plaintiff's efforts to exploit the Richmond market. Proof of this predicate would not entitle plaintiff to damages for plaintiff's unsuccessful efforts to exploit other markets. These other eleven markets are clearly not within the target area, *i.e.*, "the sector of the economy in which the violation threatened a breakdown of competitive conditions." South Carolina Council of Milk Producers, Inc. v. Newton, 360 F.2d at 418. Thus, the motion to dismiss the claim for damages to plaintiff's ventures in other cities is GRANTED.

III.

Defendant finally moves to dismiss the complaint on the ground that STAR is not the proper plaintiff because STAR has alleged insufficient facts to establish that it has the authority to assert RST's claims. To the contrary, the Court finds that there is sufficient allegation of this authority. It may well be that the facts as developed may not show this authority, especially with respect to the claims of limited partners. But the allegations of authority and the allegations of the right to

assert the claim are sufficient. Accordingly, the motion to dismiss on this ground will be denied.

An appropriate order shall issue.

/s/
United States District Judge

Date: 5 March 1982

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

CIVIL ACTION No. 80-0681-R

SATELLITE TELEVISION &
ASSOCIATED RESOURCES, INC.,

v.

CONTINENTAL CABLEVISION OF
VIRGINIA, INC., *et al.*,

FILED
MAR 26 1982
CLERK, U. S. DIST. COURT
RICHMOND, VA.

JUDGMENT

In accordance with the memorandum filed herewith, summary judgment is ENTERED for defendants.

/s/
United States District Judge

Date: 26 March 1983

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

CIVIL ACTION NO: 80-0681-R

SATELLITE TELEVISION AND
ASSOCIATED RESOURCES, INC.

v.

CONTINENTAL CABLEVISION OF
VIRGINIA, INC., *et al.*

FILED
MAR 26 1982
CLERK, U.S. DIST. COURT
RICHMOND, VA.

MEMORANDUM

The parties to his action have filed cross-motions for summary judgment, accompanied by lengthy briefs, numerous affidavits and exhibits, and an extensive joint stipulation of facts (JS).[1] Plaintiff argues that (1) defendants' exclusive contracts are illegal per se under § 1 of the Sherman Act, 15 U.S.C. § 1; (2) defendants' contracts are illegal tying agreements under § 1 of the Sherman Act; (3) defendants' contracts constitute illegal monopolization and attempt to monopolize under § 2 of the Sherman Act, 15 U.S.C. § 2; and (4) defendants have violated the Virginia Antitrust Act, §§ 59.1-9.1 to 59.1-9.18. Defendants argue that (1) the rule of reason applies in this case; (2) the exclusivity provision promoted rather than

[1] Counsel are to be commended for the substantial savings in costs to their respective clients and savings in court time through their hard work in preparing and agreeing to the compendious stipulations.

hindered competition; (3) no tying agreement existed; (4) defendants did not possess the requisite market power or the intent to monopolize to violate § 2 of the Sherman Act; and (5) defendants did not violate the Virginia Antitrust Act.

Upon consideration of the facts and the relevant law, the Court grants defendants' motion for summary judgment for the reasons set forth in defendants' briefs. The arguments presented in plaintiff's briefs are for the most part contrary to the law and avoid the facts of the case. This memorandum, therefore, will largely restate the pertinent law and facts as presented in defendants' briefs.

Plaintiff's contention that an exclusive contract is illegal per se is not supported by law. The Supreme Court stated in Continental TV, Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49-50 (1977), "Per se rules of illegality are appropriate only when they relate to conduct that is manifestly anticompetitive." An exclusive dealing contract does not violate the Sherman Act unless it is probable that performance of the contract will foreclose competition in a substantial share of the relevant market. Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 327 (1961). Before determining the effect of the exclusive dealing contract on competition, it is necessary first to ascertain the relevant product and geographic market.

The relevant product market includes those products or services which are "reasonably interchangeable by consumers for the same purposes." United States v. E. I. Dupont de Nemours & Co., 351 U.S. 377, 395 (1956). The relevant geographic market is "the area of effective competition" for the relevant services or products which are in the product market. Standard Oil Co. v. United States, 337 U.S. 293, 299 n. 5 (1949).

Plaintiff asserts that the relevant market is pay television in apartment buildings within certain portions of the Richmond metropolitan area. This delineation is wholly without support as a depiction of the relevant market. The stipulated facts establish that plaintiff and defendants with their pay TV com-

pete directly with cinema, broadcast television, video disks and cassettes, and other types of leisure and entertainment-related businesses for customers who live in both single-family dwellings and in apartment houses in, at least, the Richmond metropolitan area. JS §§ 30, 33, 34, 36, 37, 38, 39, 40, 41, 42, 44, 47, 48, 49. Defendants point out that of the 241,413 dwellings in the Richmond metropolitan area, the exclusive contracts affected only 19,500 apartment units. Thus, only slightly over eight percent of the market was potentially affected by the exclusivity provision. The amount of the market foreclosed is weighed against other factors, including "the relative strength of the parties" and "the probable immediate and future effects which pre-emption of that share of the market might have on effective competition therein." Tampa Electric Co. v. Nashville Coal Co., 365 U.S. at 329.

Defendants are newcomers to the market.[2] The parties stipulated that absent the exclusivity provision, defendants simply would not have provided service to apartment units because of the expense and the risk involved. JS ¶ 90. In fact, plaintiff's president testified that because of the expense of installation, it would have been "folly" for defendants to have installed their cable in apartment units. Joint Appendix, Vol. 1 at 70. Thus, the exclusivity provision, which permitted defendants to seek apartment customers, had a beneficial rather than a harmful effect on competition within the market. Without exclusivity, plaintiff would have been met with no competing pay television service to apartment units, apartment dwellers could have had STAR or nothing. With exclusivity, apartment owners had a choice between defendants' service and plaintiff's service. Because the net effect within the relevant market was to create competition which otherwise would not have existed, the Court holds that the exclusive nature of the contracts did not violate § 1 of the Sherman Act. *See* Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918).

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[2] Plaintiff also is a newcomer.

Plaintiff's argument that the exclusive contract constitutes an illegal tying arrangement is without merit. For a tying arrangement to exist, there must be two separate and distinct products. Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 507 (1969). The only "product" which defendants offer is cable television service.

Plaintiff's § 2 claim is likewise rejected. To prevail under a § 2 claim, plaintiff must initially show that the defendant had monopoly power in the relevant market, United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966), or at least sufficient market power to have a dangerous probability of achieving monopolization. American Tobacco Co. v. United States, 328 U.S. 781, 785 (1946). The earlier discussion of the relevant market under the stipulated facts demonstrates that plaintiff has failed to show that defendants had monopoly power or sufficient power to create a probability of achieving such power.

To prevail on an attempt-to-monopolize claim under § 2, proof of a specific intent to destroy competition or to build a monopoly is required. United States v. Griffith, 334 U.S. 100, 105 (1948). The stipulated facts establish that defendants' determination to include the exclusivity provision was "a good faith business decision" to avoid the business risks of wiring apartment buildings. JS ¶ 90. The demonstration of a legitimate business reason for a defendant's conduct negates an inference of a specific intent to monopolize. Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 627 (1952).

Because the Virginia Antitrust Act is to be construed in harmony with the federal statutes, § 59.1-9.17, Va. Code

Ann., plaintiff has likewise failed to show that defendants violated the Virginia Antitrust Act.

Summary judgment for defendants will be GRANTED.

And it is so ORDERED.

D. D. Wassiner
United States District Judge

Date: 26 March 1982

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CLERK

No. 83-1033

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SATELLITE TELEVISION & ASSOCIATED RESOURCES, INC.,
Petitioner,

v.

CONTINENTAL CABLEVISION OF VIRGINIA, INC., *et al.*,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly considered the legality of limited exclusivity provisions in contracts between a cable television company and apartment owners under the Rule of Reason of Sherman Act § 1.

2. Whether the Court of Appeals correctly held that the exclusivity provisions were lawful under Sherman Act § 1, where (a) the petitioner failed to sustain its burden of proving the relevant product and geographic markets; (b) the exclusivity provisions did not substantially lessen competition in any relevant market; and (c) the exclusivity provisions made it possible for respondents to provide competition which would not otherwise have existed.

3. Whether the Court of Appeals correctly held that respondents had not violated Sherman Act § 2, where the petitioner (a) failed to prove the relevant market; (b) made no showing of monopoly power or probability of achieving monopoly power in any relevant market; and (c) stipulated that respondents' decision to institute limited exclusivity provisions was a good faith business judgment.

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CONTINENTAL CABLEVISION OF VIRGINIA, INC., *et al.*,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

This brief is submitted on behalf of respondents Continental Cablevision of Virginia, Inc., Continental Cablevision of Richmond, Inc., and Continental Cablevision, Inc.[1] (referred to collectively hereinafter as "Continen-

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[1] In accordance with Rules 34.1(b) and 28.1 of the Supreme Court Rules, respondents note as follows:

(1) The respondents in this case are Continental Cablevision of Virginia, Inc., Continental Cablevision of Richmond, Inc., and Continental Cablevision, Inc.

(2) Dow Jones & Company owns approximately 24.7 percent of the stock of Continental Cablevision, Inc. No other corporation owns more than 5 percent.

(3) Subsidiaries (other than wholly-owned subsidiaries) and affiliates of Continental Cablevision, Inc. include Continental County Cablevision, Inc., Big Valley Cablevision, Inc., Continental Cablevision of Morton Grove, Inc., Continental Cablevision of Springfield, Inc., Cablevision Service Co., Chan-

tal") in opposition to the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on August 11, 1983.

OPINION BELOW

The opinion of the Court of Appeals is officially reported as *Satellite Television and Associated Resources, Inc.* v. *Continental Cablevision of Virginia, Inc.*, 714 F.2d 351 (4th Cir. 1983).

STATEMENT OF THE CASE

Continental and the petitioner, Satellite Television & Associated Resources, Inc. ("STAR"), are both involved in providing pay television services in the Richmond metropolitan area. Continental offers cable television service to houses, apartments, schools, hotels, motels, and other locations. Record ("R.") 47 (Joint Stipulation ("J.S.") 4).[2] STAR, through an affiliate,[3] provides a single channel of programming that is transmitted through super-high frequency microwave signals. R. 64

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nel One, Inc., Stellar Continental Cable, Inc., Vision Cable Communications of Staten Island, Inc., Continental Cablevision of Winchester, Inc., Commonwealth Cablevision Corporation, Rockingham County Cablevision, Inc., Continental Cablevision of Brockton, Inc., Continental Cablevision of Needham, Inc., and Continental Cablevision of Richmond, Inc.

[2] Record citations in the form "R. ——" refer to page numbers in the Joint Appendix filed with the Court of Appeals. Contained within this record of trial is the "Joint Stipulation", a set of stipulated facts on liability which, together with twelve volumes of documents and testimony, was submitted to the trial court for the purpose of obtaining a decision on the merits with respect to liability.

[3] STAR itself does not directly provide pay television service, but a subsidiary of STAR is the corporate general partner of RST Ltd., a limited partnership which operates the single-channel pay television service in the Richmond area. R. 49 (J.S. 11, 12).

(J.S. 71). Continental and STAR compete with a variety of entertainment businesses, including broadcast television, movie theaters, video cassettes and disks, spectator events, radio, theatres, phonographs, and sports activities. R. 56-57 (J.S. 36-38).

At issue in this case is the legality of limited exclusivity provisions formerly contained in agreements between Continental and certain Richmond-area apartment building owners. These provisions gave Continental, in exchange for Continental's agreement to wire an apartment building for cable television, an exclusive right for a limited time [4] to provide pay television service in that building.

The purpose and effect of the exclusivity provisions were to help Continental overcome the otherwise unacceptable business risks associated with installing cable television service in apartment buildings. As compared to wiring single-family dwellings, wiring apartment buildings is extremely costly. R. 67 (J.S. 80). It requires extending lines underground, drilling between floors or units, and snaking wires throughout the buildings to every unit, whether or not its resident is a subscriber. *Id.* These costs and difficulties are magnified in the Richmond metropolitan area by the high incidence of garden-style apartments, which because of their physical layout are especially expensive and risky to wire. R. 68 (J.S. 83).[5]

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[4] Continental periodically reviewed the exclusivity provisions and altered them, by shortening the term of exclusivity, to make them commensurate with perceived financial risks. R. 72 (J.S. 98), 429-430, 443-445. None was in effect for longer than twenty-three months. R. 71, 73 (J.S. 98, 101).

[5] Continental also determined that its expenses would be increased because of a greater loss of equipment in apartments than in single-family dwellings, a higher "skip rate," and a higher turnover rate which would result in increased expenses for disconnecting and reconnecting the service. R. 69 (J.S. 86).

Most cable companies simply refuse to incur the high cost of wiring apartment buildings. R. 68 (J.S. 82). STAR's president, Richard Lubic, who had spent years in the cable business, testified that it would be "folly" for any cable company to attempt to wire major apartment buildings. R. 470. "[M]ost cables do not go after the multi-family housing because it is too expensive for them to wire." R. 466. As a result, according to Lubic, "very few multiple housing units are served by any form of cable television in the country." R. 469.

Thus, Continental was confronted with the business decision of whether to forego serving apartments or to embark upon the extremely expensive and economically perilous course of wiring the apartment buildings. R. 70 (J.S. 89). Continental concluded that it would be economically feasible to bear the cost of wiring apartment buildings only if it could negotiate an exclusivity provision which would afford Continental a reasonable chance of recovering its costs of installation. R. 70 (J.S. 90). Continental carefully considered several options other than the use of exclusivity provisions, R. 69 (J.S. 86), and concluded that these options were infeasible and unsatisfactory. *Id.*

Continental decided, therefore, to seek limited exclusivity provisions in contracts with apartment owners where Continental paid the cost of wiring. R. 70 (J.S. 90).[6] STAR has stipulated that Continental's decision to seek limited exclusivity was "a good faith business decision." *Id.* STAR has also stipulated that "but for the exclusivity provisions, [Continental] would not have wired MDUs [multi-dwelling units]." R. 70 (J.S. 90).

The first exclusivity provisions went into effect in July 1978. None was in effect after June 1980. R. 71, 73 (J.S. 93, 101). At no time did the exclusivity provisions

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[6] Continental offered to delete the provisions where apartment owners agreed to pay the cost of wiring. R. 71 (J.S. 93, 95).

affect more than eight percent of the dwelling units in the Richmond metropolitan area. R. 73-74, 75 (J.S. 102, 105).

SUMMARY OF ARGUMENT

The arguments presented by STAR in its petition address primarily factual issues, such as whether Continental would in fact have provided cable television service to apartment buildings absent the exclusivity provisions. These factual issues have long since been settled, not only by the determinations of the courts below, but also by STAR's own stipulations at trial. There is no justification for relitigating the same factual issues before this Court.

The legal arguments in STAR's petition fail to demonstrate any respect in which the Court of Appeals' decision was incorrect or out of line with prior antitrust decisions of other federal courts. The Court of Appeals correctly held (a) that exclusivity provisions are properly considered under the Rule of Reason of Sherman Act § 1; (b) that STAR's failure to prove either a relevant product market or a relevant geographic market was fatal to STAR's claims under Sherman Act §§ 1 and 2; (c) that STAR's failure to show that Continental had market power or that Continental had the intent to monopolize any market was also fatal to STAR's Sherman Act § 2 claim; (d) that exclusivity provisions are not illegal "tying" arrangements; and (e) that Clayton Act § 3 is inapplicable to the sale of services such as television programming. All aspects of the Court of Appeals' holding are soundly reasoned and fully supported by antitrust authority. STAR's petition is without merit and should be denied.

ARGUMENT

1. The contentions advanced by STAR are predominantly factual in nature, and are contradicted by STAR's own stipulations at trial.

STAR's petition is, in predominant part, a resurrection of factual issues long since settled by stipulation of the parties or findings of the trial court. The petition addresses at some length, for example, the legitimacy of Continental's business justification for seeking exclusive contracts with apartment owners, Petition ("Pet.") 5-7 and 11-13, and the allegedly adverse effect which those contracts had on STAR's operations, *id.* at 3-4 and 7. The petition proffers once again STAR's discredited factual claims as to the percentage of market foreclosure allegedly resulting from the exclusivity provisions, *id.* at 4, and complains of the "restrictive definition of the relevant market" adopted by the trial court, *id.* at 9. *See also id.* at 4, n.5.

STAR's persistent effort to relitigate facts has no place in an appellate proceeding. All of the factual contentions which STAR advances in its petition to this Court were presented to and fully considered by the trial court.[7] STAR presented all of the same factual contentions to the Court of Appeals, both in the initial hearing of its appeal and in its petition for rehearing *en banc*. Both the trial court and the Court of Appeals determined that STAR's version of the facts was without support in the record, and was contradicted in numerous respects by STAR's own stipulations at trial. On all of these factual issues STAR has had its day in court, and is not entitled to another.

Nothing in STAR's factual arguments, moreover, detracts in any way from the central, dispositive facts of

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[7] As the Court of Appeals held, the District Court's judgment in this case was based on a "full trial". Appendix to the Petition ("Pet. App.") 4a. STAR does not contend otherwise.

this case, all of which are based on STAR's own stipulations and admissions. Those facts, as found by the trial court, conclusively establish that the exclusivity provisions employed by Continental, a newcomer to the Richmond market, "had a beneficial rather than a harmful effect on competition within the market." R. 151; Pet. App. 26a. Based upon the stipulations and STAR's admissions, the trial court found:

> Without exclusivity, plaintiff would have been met with no competing pay television service to apartment units; apartment dwellers could have had STAR or nothing. With exclusivity, apartment owners had a choice between defendants' service and plaintiff's service. [R. 151; Pet. App. 26a.]

In reaching its conclusion, the trial court relied on the parties' stipulation that, absent the exclusivity provisions, Continental would not have been able to provide service to apartment units because doing so would have involved an unacceptable business risk. R. 70 (J.S. 88, 90). STAR's petition presents no basis whatsoever for overturning the trial court's findings of fact.

2. The decision of the Court of Appeals is fully consistent with and supported by prior antitrust decisions of this Court and other federal courts.

The decision of the Court of Appeals in this case was based on five legal conclusions, each firmly grounded in hornbook principles of antitrust law. Those legal conclusions were: (1) that the validity of exclusive dealing contracts is properly considered under the Rule of Reason of Sherman Act § 1, not the *per se* rule of illegality; (2) that STAR's failure to sustain its burden of proving the relevant geographic and product markets was fatal to its claims under Sherman Act §§ 1 and 2; (3) that STAR's failure to show either the probability of Continental's achieving monopoly power, or Continental's intent to do so, was fatal to STAR's attempted monopoliza-

tion claim; (4) that exclusivity provisions are not illegal "tying agreements"; and (5) that Clayton Act § 3 is inapplicable to the sale of services (such as television programming).

Nothing in these five legal conclusions represents even a slight departure from well-settled law. Nor is this case one of first impression, despite STAR's effort to make it seem so, merely because cable television is involved. On its facts and in its legal analysis the Court of Appeals' decision is squarely in line with prior antitrust decisions of this Court and other federal courts.

a. Exclusivity provisions are not *per se* illegal.

STAR apparently still contends, as it did at trial and on appeal, that the challenged exclusivity provisions are *per se* illegal under Sherman Act § 1. Pet. 10-11. This contention is totally without merit. "Neither an exclusive dealing requirement nor a territorial sales solicitation requirement has ever been held by the Supreme Court to be a *per se* violation of the antitrust laws." *Bravman* v. *Bassett Furniture Industries, Inc.*, 552 F.2d 90, 101 (3d Cir.), *cert. denied*, 434 U.S. 823 (1977). On the contrary, the federal courts have repeatedly held that the validity of exclusive dealing arrangements under Sherman Act § 1 is governed by the Rule of Reason. *E.g., Savon Gas Stations Number Six, Inc.* v. *Shell Oil Co.*, 309 F.2d 306, 309 (4th Cir. 1962), *cert. denied*, 372 U.S. 911 (1963).[8]

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[8] *See also* Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 333 (1961); Donovan v. Pennsylvania Co., 199 U.S. 279 (1905); Fleer Corp. v. Topps Chewing Gum, Inc., 658 F.2d 139, 147-148 (3d Cir. 1981), *cert. denied*, 455 U.S. 1019 (1982); American Motor Inns, Inc. v. Holiday Inns, Inc., 521 F.2d 1230, 1246-50 (3d Cir. 1975); Smith v. Scrivner-Boogaart, Inc., 447 F.2d 1014, 1017 (10th Cir. 1971), *cert. denied*, 404 U.S. 1059 (1972); Export Liquor Sales, Inc. v. Ammex Warehouse Co., 426 F.2d 251, 252 (6th Cir. 1970), *cert. denied*, 400 U.S. 1000 (1971); Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71, 76 (9th Cir. 1969),

b. The plaintiff has the burden of proving the relevant market under Sherman Act § 2 as well as Sherman Act § 1.

The Court of Appeals held that STAR had failed to prove either a relevant geographic or relevant product market. 714 F.2d at 355-57; Pet. App. 6a-10a. STAR, in its petition to this Court, does not appear to contest this aspect of the Court of Appeals' decision. Instead, STAR contends, with respect to its Sherman Act § 2 claim, that as a matter of law it was not required to prove the relevant market. Pet. 9-10.

This contention has absolutely no basis in the law. It is an argument which has been consistently rejected by this Court and the lower federal courts. *E.g.*, *United States* v. *Grinnell Corp.*, 384 U.S. 563, 570-71 (1966); *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172, 177 (1965) ("Without a definition of . . . market there is no way to measure [defendant's] ability to lessen or destroy competition"); *Blanton* v. *Mobil Oil Corp.*, 1984-1 Trade Cas. (CCH) ¶ 65,765 at 67,143-67,144 (9th Cir. 1983); *Richter Concrete Corp.* v. *Hilltop Concrete Corp.*, 691 F.2d 818, 826-27 (6th Cir. 1982); *Dimmitt Agri Industries, Inc.* v. *CPC International, Inc.*, 679 F.2d 516, 525 (5th Cir. 1982), *cert. denied*, 103 S.Ct. 1770 (1983); *In Re Municipal Bond Reporting Antitrust Litigation*, 672 F.2d 436, 441 (5th Cir. 1982); *Edward J. Sweeney & Sons, Inc.* v. *Texaco, Inc.*, 637 F.2d 105, 117 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981); *Nifty Foods Corp.* v. *Great Atlantic & Pacific Tea Co.*, 614 F.2d 832, 840 (2d Cir. 1980); *Moore* v. *Jas. H. Matthews & Co.*, 550 F.2d 1207, 1218-19 (9th Cir. 1977); *Coleman Motor Co.* v. *Chrysler Corp.*, 525 F.2d 1338 (3d Cir. 1975); *Sulmeyer* v. *Coca Cola Co.*, 515 F.2d 835, 850-51 (5th Cir.), *cert. denied*, 424 U.S. 934

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cert. denied, 396 U.S. 1062 (1970); Susser v. Carvel Corp., 332 F.2d 505, 516-517 (2d Cir. 1964); Parmelee Transp. Co. v. Keeshin, 292 F.2d 794 (7th Cir.), *cert. denied*, 368 U.S. 944 (1961).

(1975); *Mullis* v. *Arco Petroleum Corp.*, 502 F.2d 290, 295 (7th Cir. 1974); *Acme Precision Products, Inc.* v. *American Alloys Corp.*, 484 F.2d 1237 (8th Cir. 1973). All of these cases stand squarely for the proposition that the plaintiff in a Sherman Act § 2 case must prove the relevant market affected by the alleged violation.

None of the cases cited by STAR holds or suggests otherwise. In each case, the court found that the defendant possessed monopoly or near-monopoly market power — a finding that can be made only in the context of a defined relevant market.[9] For example, in *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973), Otter Tail had a monopoly in one market (electric power at the wholesale level) and was charged with using its monopoly power to control another market (retail electric power). In *United States* v. *Griffith*, 334 U.S. 100 (1948), and *United States* v. *Crescent Amusement Co.*, 323 U.S. 173 (1944), the defendants were charged with using their monopoly power in certain motion picture exhibition markets to eliminate competition in other markets. In *Lorain Journal* v. *United States*, 342 U.S. 143 (1951), the defendant newspaper sought to retain its monopoly of a well-defined relevant market — "the mass dissemination of news and advertising, both of a local and national character" in the town of Lorain. *Id.* at 147. The three lower court cases relied on by STAR are equally inapposite. *See Gamco, Inc.* v. *Providence Fruit & Produce Building, Inc.*, 194 F.2d 484 (1st Cir.) (defendant's market building was a monopoly), *cert. denied*, 344 U.S.

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[9] *See, e.g.*, United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966) (the offense of monopoly consists in part of "the possession of monopoly power in the relevant market"); United States v. E.I. Dupont de Nemours & Co., 351 U.S. 377, 393 (1956) (illegal power "must be appraised in terms of the competitive market of the products"). STAR's description of cable television as a "natural monopoly" appears to be just another way of arguing that the relevant product market is cable television. There is absolutely no support in the record for such a narrow product market definition.

817 (1952); *American Federation of Tobacco Growers* v. *Neal*, 183 F.2d 869, 872 (4th Cir. 1950) (defendant monopolized auction sale of tobacco in Danville); *William Goldman Theatres, Inc.* v. *Loew's, Inc.*, 150 F.2d 738 (3d Cir. 1945) (defendant held a monopoly of first-run motion picture exhibition in Philadelphia).

c. Exclusive dealing arrangements are not tying arrangements.

The Court of Appeals rejected STAR's "tying" argument on the ground that Continental obviously did not offer, let alone "tie," two products or services. 714 F.2d at 358, n.14; Pet. App. 12a, n.14. This conclusion is fully supported by the record and fully consistent with decisions of this Court. *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U.S. 495, 507 (1969); *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 614 (1953).

STAR does not deny that Continental offers only one service — cable television programming. STAR argues, however, that Continental "tied" the sale of its service to the non-sale of other competing pay television service. Pet. 13. The only authority cited by STAR in support of this position is one out-of-context half-sentence from *Northern Pacific Railway* v. *United States*, 356 U.S. 1 (1958). Pet. 13. This language is totally inapposite. It states simply that a tying arrangement may exist where the purchaser of the tying product "agrees that he will not purchase [the tied] product from any other supplier." 356 U.S. at 5-6. Nothing in the half-sentence cited by STAR, or in any other part of the *Northern Pacific* decision, or in any other case, even remotely suggests that a tie would exist if the seller in question were not a supplier of, or did not at least have a financial interest in, the sale of two distinct products.

d. Clayton Act § 3 does not apply to the sale of services.

The Court of Appeals affirmed the dismissal of STAR's Clayton Act § 3 claim, holding that Clayton Act § 3 does not apply to the sale of services such as the television programming offered by Continental. 714 F.2d at 358; Pet. App. 12a. STAR concedes in its petition that "television programming is not a commodity." Pet. 14. STAR argues, however, that the agreements between Continental and apartment owners were essentially agreements "for the installation of a cable TV system in their building," and were therefore analogous to "leases of machinery." *Id.*

This argument was presented to and specifically rejected by the Court of Appeals, which held "it is the programming that is by far the chief concern *of all parties to the transaction.*" 714 F.2d at 358; Pet. App. 12a (emphasis added). This holding is fully consistent with other federal court decisions in analogous cases. *E.g.*, *Aviation Specialties, Inc.* v. *United Technologies Corp.*, 568 F.2d 1186, 1191 (5th Cir. 1978) (holding aircraft repairs to be services even though substantial numbers of replacement parts were supplied during the repair process); *Hudson Valley Asbestos Corp.* v. *Tougher Heating & Plumbing Co.*, 510 F.2d 1140, 1144 (2d Cir.), *cert. denied*, 421 U.S. 1011 (1975) (holding an insulation contracting business to consist primarily of the service of covering pipes and ducts rather than the supply of insulation materials); *Kennedy Theater Ticket Service* v. *Ticketron, Inc.*, 342 F. Supp. 922, 927 (E.D. Pa. 1972) (holding that since the dominant purpose of a sale of a theater admission ticket "is not merely the purchase of the tangible admission ticket, but rather the contractual right to occupy a seat at an entertainment attraction," such tickets are not "commodities" within the meaning of the Clayton Act).

CONCLUSION

STAR has failed to present any "special or important reasons" for review on writ of certiorari in this case, S.Ct. R. 17, and has failed to establish any error in the decision of the Court of Appeals. STAR's petition for a writ of certiorari should therefore be denied.

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No. 83-1033

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SATELLITE TELEVISION & ASSOCIATED RESOURCES, INC.

Petitioner,

v.

CONTINENTAL CABLEVISION OF VIRGINIA, INC., *et al.*,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

ARGUMENT

1. The Respondents' Brief In Opposition Goes Outside The Opinions Below To Construct Factual Issues Not Addressed By Either Court

Respondents' brief in opposition asserts a number of alleged factual justifications for its exclusivity provision and asserts that these issues were decided by the courts below. Neither court, however, addressed the kind of factual arguments advanced by Respondents, both courts taking as a *given* that because of Defendants' unilateral refusal to install their system without exclusivity, that that provision had the beneficial effect of bringing Defendants' cable system into the apartments. The decision

below, by accepting the fact of Continental's refusal to install as a justification begs the question of whether such a refusal was permissible under the antitrust laws. The two sentence extract quoted from the District Court opinion on page 7 of Respondents' brief is the *total* consideration given by that court to the reasonableness of Defendants' contracts, and the Court of Appeals accepted that conclusion without question. (Petition, p. 11a). The question thus presented by this conclusion is one of law: Is it proper for the trial court to accept at face value as a justification for foreclosing competition under the Rule of Reason the unilateral declaration of one party that it will not participate unless competition is excluded, without inquiring into the reasonableness or justification for that position? By answering that question in the affirmative the courts below have, Petitioner contends, stretched the Rule of Reason far beyond the boundaries heretofore permitted by this court.

2. The Issues Presented Are Exclusively Questions Of Law

The case having been submitted on cross motions for summary judgment, it was the position of both parties, unquestioned by either of the courts below, that there were no material issues of fact. The lower courts' conclusions both as to the reasonableness of Defendants' exclusivity provisions, and as to the proper definition of a relevant market, including the extent to which that definition was relevant, were rulings of law and they were erroneous.

3. Respondents' Contention That Exclusivity Agreements Have Never Been Held By This Court Per Se Unlawful Is In Error

Respondents quote a statement by the Third Circuit that "Neither an exclusive dealing agreement nor a ter-

ritorial sales solicitation requirement has ever been held by the Supreme Court to be a *per se* violation of the antitrust laws." *Bravman* v. *Bassett Furniture Industries, Inc.*, 552 F.2d 90, 101 (3rd Cir.), *cert. denied*, 434 U.S. 823 (1977). Exclusive dealing arrangements, however, have repeatedly been held unlawful where, as here, they are imposed through tying or leveraging a strategic advantage. The tying agreements struck down by this Court in *Northern Pacific Railway Co.* v. *United States*, 356 U.S. 1 (1958) (limited exclusive transportation contracts); *International Salt Co., Inc.* v. *United States*, 332 U.S. 392 (1947) (exclusive supply of salt tablets); and *International Business Machines Corp.* v. *United States*, 298 U.S. 131 (1936) (exclusive supply of punch cards, were all exclusive dealing as well as tying contracts. Exclusive dealing was also one of the elements of illegality found by this court in *Fashion Originators' Guild of America, Inc.* v. *Federal Trade Commission*, 312 U.S. 457, 465 (1941).

Respondents' legal proposition that there is such a thing as a definable category of contracts labeled "exclusive dealing contracts" that are governed by a single rule is mistaken. The concepts of "tying" and "exclusive dealing," while distinct, are not mutually exclusive as Respondents contend. Some tying contracts have no element of exclusive dealing, such as those in *United States* v. *Loew's, Inc.*, 371 U.S. 38 (1962) (diverse motion pictures leased as a package containing several different films), and some exclusive dealing agreements have no element of tying, such as *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U.S. 320 (1961) (requirements contract for coal). But the contracts in *Northern Pacific*, *International Salt* and *IBM* were at the same time tying and exclusive dealing agreements. Section 3 of the Clayton Act condemns both tying and exclusive dealing

agreements with the identical language, making no distinction between them. Indeed, the presence or absence of tying is a consistent factor in distinguishing legal, from illegal exclusive dealing arrangements: *Cf. Osborn* v. *Sinclair Refining Co.*, 286 F.2d 832 (4th Cir. 1961) (gasoline retailers exclusive arrangements with TBA manufacturers held illegal tying, the court noting that the arrangement served to exploit a bottleneck position of the retailer); *Susser* v. *Cavel Corp.*, 332 F.2d 505, 511 (2d Cir. 1964) (majority and dissent differed over whether the exclusive dealing contract was also a tying contract, but neither considered the categories mutually exclusive); *Warriner Hermetics, Inc.* v. *Copeland Refrigeration Corp.*, 463 F.2d 1002, 1011 (5th Cir. 1972) (per se instruction required in exclusive dealing case); *Bales* v. *Kansas City Star Company*, 336 F.2d 439 (8th Cir. 1964) (exclusive dealing agreement between newspaper and independent distributors held to violate both Sherman 1 and Clayton 3). One of the key factors that serves to distinguish legal exclusive dealing from illegal exclusive dealing or tying arrangements is the existence of some mutual advantage in the exclusivity itself. See, e.g., *Standard Oil Co. of California and Standard Statems, Inc.* v. *United States*, 337 U.S. 293, 307 (1949) (Dictum noting that a characteristic distinction between the pure types of tying and exclusive dealing agreements is that in the latter the exclusivity provision works to the mutual advantage of both parties). The exclusive railroad transportation agreement in *Northern Pacific* on the other hand, this Court pointed out, contained no advantage for the farmer in the exclusivity feature itself. Here, too, the apartment owner gains no advantage from the exclusivity feature, and is in fact disadvantaged, as the owners themselves protested. (Petition, p. 4 n.1).

Even in the absence of tying, exclusivity imposed through leveraging market power was held to constitute a Section 2 violation as pointed out in our original Petition. (Page 9, note 9).

Thus, on the present facts, two grounds of illegality are present, either one of which is sufficient to nullify the legal proposition asserted by Respondents. Moreover, the question need not necessarily be viewed as one of per se illegality. All of the factors cited above make clear that exclusivity as used here had no purpose other than to foreclose competition which is sufficient to make it unlawful under the Rule of Reason.

4. Respondents' Contentions Concerning The Relevant Market Have No Application Where The Offense Charged Is Tying Or Leveraging A Strategic Position

The Respondents' contentions concerning the relevant market are in error at two levels. First, because the District Court's decision was based upon an improper legal standard, and second, because a relevant market determination is not essential to either a finding of per se violation of Section 1, or attempts to monopolize under Section 2, both of which are violations asserted by Petitioner.

First, the District Court applied an improper legal standard, expressly rejecting one of the criteria enumerated by this Court in *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 325 (1962) which pointed out that within the broad relevant market "well-defined submarkets may exist, which in themselves, constitute product markets for antitrust purposes." The Court of Appeals ignored this ruling, asserting in a footnote that "The use of the term 'submarket' is to be avoided; it adds only confusion to an already imprecise and complex endeavor." (Petition, p. 7a, note 5) And we have already noted in our

Petition the clear conflict between the 4th Circuit's use of the relevant market concept in this case with that of the Third Circuit in *Goldman Theatres* (Petition p. 19, n. 10). But we have not stressed this error in our Petition because although the criteria of *United States* v. *Grinnell Corp.*, 384 U.S. 563 (1966) are easily met on the facts of this case given a proper definition of the relevant market, it is unnecessary to contest that issue when violations of law can be shown without such a definition.

Thus the second error in Respondent's arguent overlooks the fact that the definition of a relevant market in the *Grinnell* or *Du Pont* sense is not controlling where an attempt to monopolize in violation of Section 2 is alleged, because Section 2 forbids such behavior with respect to "any part" of commerce. This exception has been recognized repeatedly by this Court. *United States* v. *E.I. Du Pont De Nemours & Co.*, 351 U.S. 377, 365 (1956) in n.23 on page 365 cited a whole list of precedents falling outside the relevant market concept applied in that case. This Court has repeatedly affirmed that exception, as stated in *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 611 (1953):

> "The 'market', as most concepts in law or economics, cannot be measured by metes and bounds. Nor does the substance of Sherman Act violations typically depend on so flexible a guide. Section 2 outlaws monopolization of any 'appreciable part' of the interstate commerce . . ."

This same rule was the basis for this Court's decision in *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973); *United States* v. *Griffith*, 334 U.S. 100 (1948); *United States* v. *Crescent Amusement Co.*, 323 U.S. 173 (1944), and other cases cited in note 10 on page 10 of our petition.

In addition to the section 2 exception, a relevant market does not have to be defined when a per se violation is alleged, and the tying charge supplies that element here. These dual exceptions were the basis of the decision in the recent case of *Blanton* v. *Mobil Oil Corp.*, 1984-1 Trade Cas. (CCH) ¶ 65,765 at pp. 67,143 - 67,144 (9th Cir. 1983) cited on page 9 of Respondents' brief, which stands not at all for the proposition they assert, but for the opposite contention of Petitioner. That opinion, at page 67,143, quotes from its earlier decision in *Lessig* v. *Tidewater Oil Co.*, 327 F.2d 459, 474-5 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964) as follows:

> "When the charge is attempt (or conspiracy) to monopolize, rather than monolization,, the relevant market is 'not in issue.' *United States* v. *E.I. Du Pont & Co.*, 351 U.S. 377, 395 n.23, 76 S.Ct. 994, 100 L.Ed. 1264 (1965). Section 2 prohibits attempts to monopolize 'any part' of commerce, and a dominant position in the business of distributing petroleum products and TBA was not necessarily prerequisite to ability to attempt to monopolize an appreciable segment of interstate sales in such products."

In *Blanton* the court sustained a jury finding of a Section 2 violation regardless of a proper finding on the relevant market because a per se violation was proved. The fact that Continental's conduct was intentional and exclusionary, and directed specifically at Plaintiff is undisputable on the basis of its own admissions and the protest of the Richmond Apartment Council (Petition pp. 9, 12, and 4 (note 1)).

CONCLUSION

The inability of Respondents to cite any relevant authority for the legal position taken by the courts below demonstrates how far those opinions depart from the decisions of this Court and other Circuits.

Respectfully submitted,

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